UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CINDY ABSHIRE, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants.

No. 2:21-cv-00198-JAM-KJN

ORDER GRANTING STATE, COUNTY, AND TOWN DEFENDANTS' MOTIONS TO DISMISS WITH PREJUDICE

Plaintiffs are in the business of providing short term lodging and dining services in Mammoth Lakes California (Mono County). In this case they challenge various State and Regional Public Health Orders enacted to stop the spread of COVID-19. See generally Compl., ECF No. 1. Plaintiffs allege these orders have resulted in: (1) substantive due process violations; (2) procedural due process violations; (3) equal protection violations; (4) uncompensated takings; and (5) commerce clause violations. See generally id. Plaintiffs brought this action

against various State, County, and Town officials. Id. Defendants now move to dismiss. [1]

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

The facts of this case are familiar to the parties and will not be repeated in detail here. It involves the COVID-19 pandemic and the state and local governments' response thereto, which has been paramount to our lives since early 2020. On March 4, 2020, Governor Gavin Newsom declared a State of Emergency in California due to the threat of COVID-19. Compl. ¶ 46. This was followed on March 19, 2020 with Executive Order N-33-20, which directed all residents to shelter in place except as needed to maintain a continuity of operations of defined critical infrastructure sectors. Id. ¶¶ 49-50. There has since been a series of executive orders, public health orders, and guidance from state and local officials to respond to the evolving nature of the pandemic in California. See id. ¶¶ 51-72. Following the State's guidance, Mono County generally mirrored the State's restrictions in its own public health orders. See id. ¶¶ 82-83, 85-87.

Relevant here, the initial public health orders issued in March 2020 precluded hotels, private property owners, RV parks, and other rental properties from renting out to the public, except for essential workers, displaced residents needing shelter, and for traveler safety. Id. ¶¶ 83, 85, 86, 87. In May

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for June 8, 2021.

2020, Mono County revised the orders to permit RV parks and campgrounds to operate at 75% capacity; and then followed suit for hotels and short-term rentals in June 2020. Id. ¶¶ 92, 93. On August 11, 2020, the County and Town issued an order reducing capacity to 70% for hotels and short-term rentals in the Town. Id. ¶¶ 94, 95; Town's Request for Judicial Notice ("Town's RJN") Ex. A, ECF No. 16.

In August 2020, the state adopted the Blueprint for a Safer Economy and its color-coded tier system. Compl. ¶ 55. Under this system restaurants were required to: (1) cease all indoor dining in the purple tier; (2) limit indoor dining to 25% in the red tier; or (3) limit indoor dining capacity to 50% in the orange and yellow tiers. Id.

By December 2020, California experienced its biggest surge of COVID-19 cases since the pandemic began. As a result, the State issued a Regional Stay-at-Home Order that imposed new restrictions, with the goal of preventing a catastrophic strain on the State's hospitals and, in particular, intensive care units. Under the State Regional Stay-at-Home Order, the Southern California Region, which includes Mono County, was required to cease all hotel and short-term rentals between December 6, 2020 and January 25, 2021 except for certain mitigation and containment purposes. See id. ¶¶ 97, 109; County's Request for Judicial Notice ("County's RJN") Ex. 22, ECF No. 19. After the State Regional Stay-at-Home Order was lifted for the Southern California region, hotels and short-term rentals were permitted to reopen, subject to the same 70% capacity restrictions. Town's RJN Ex. A, B, C. The Town's January 31, 2021 Public Health Order

also required short-term rentals be left vacant for 24 hours between occupancies. Town's RJN, Ex. C. This was intended to "disperse visitation to Mammoth Lakes over a longer period of time thereby avoiding overcrowding and visitor concentration during 'peak' visitation periods" and to allow time for sanitization between stays. Id. On February 26, 2021, the Town issued an order that removed the 70% occupancy limit but retained the 24-hour vacancy requirement. Town's RJN, Ex. D. On March 9, 2021, the Town rescinded all its prior Public Health Orders that imposed lodging restrictions, including the 24-hour vacancy requirement. Town's RJN, Ex. E.

On December 9, 2020, the Town sent a letter to the local lodging community advising them of the restrictions imposed by the State and County. Town's RJN, Ex F. The letter also identified the potential consequences for violation of such orders pursuant to the Town's Municipal Code — fines of up to $1,000 per day and potential revocation of the violator's business tax certification for up to twelve months. Id. During the period that the State Regional Stay-at-Home Order was in effect for the Southern California Region, Plaintiff Cindy Abshire rented out a short-term rental in violation of the Stay-at-Home Order, resulting in the Town issuing a citation for the violation on January 21, 2021. Compl. ¶ 112. Similarly, the Town issued a citation for Plaintiffs Alan and Monica Butt on December 21, 2020, for violation of the Regional Stay-at-Home Order when a party was hosted at their property. Id. ¶ 118.

On February 1, 2021 Plaintiffs filed the instant action challenging the constitutionality of the restrictions issued in

response to the pandemic. In addition to the individual Plaintiffs who were issued citations — Cindy and Timothy Abshire and Alan and Monica Butts — Plaintiffs also include Nomadness Corporation ("Nomadness"), a corporation that contracts with property owners to manage, operate, and provide lodging services, and Mammoth Lakes Business Coalition (the "Coalition"), a membership association of dining and lodging businesses in Mammoth Lakes. Id. ¶¶ 19-24. Plaintiffs assert claims against various officials of the State, Mono County, and Town of Mammoth Lakes for: (1) substantive due process violations; (2) procedural due process violations; (3) equal protection violations; (4) uncompensated takings; and (5) commerce clause violations. See generally id. Defendants moved to dismiss all of Plaintiffs' claims. State Defs.' Mot. to Dismiss, ECF No. 17 ("State's Mot."); County Defs.' Mot. to Dismiss, ECF No. 18 ("County's Mot."; Town Defs.' Mot. to Dismiss, ECF No. 15 ("Town's Mot."). Plaintiffs opposed these Motions, Pls.' Opp'n, ECF No. 29, to which Defendants responded. State Defs.' Reply ("State's Reply"), ECF No. 32; County Defs.' Reply ("County's Reply"), ECF No. 33; Town Defs.' Reply ("Town Reply"), ECF No. 31. For the reasons set forth below, the Court finds Plaintiffs have failed to state a plausible claim relief and therefore grants Defendants' Motions.

II. OPINION

A. Judicial Notice

Defendants all request the Court take judicial notice of various orders enacted by the State, County, and Town. See

State's Request for Judicial Notice ("State's RJN"), ECF No. 17-2; County's Request for Judicial Notice ("County's RJN"), ECF No. 19; Town's Request for Judicial Notice ("Town's RJN"), ECF No. 16. Additionally, State Defendants request the Court take judicial notice of the Centers for Disease Control and Prevention's COVID Data Tracker and its publicly reported data, and the State's Tracking COVID-19 in California dashboard and its publicly reported data. State's RJN, Ex. 1, 2. Town Defendants also request the Court take judicial notice of the transcript of this Court's own decision in Best Supplement Guide, LLC v. Newsom, No. 20-cv-00965-JAM-CKD (E.D. Cal. Oct. 27, 2020). Town's RJN, Ex G. Plaintiffs do not specifically oppose the requests for judicial notice but rather point out that the Court may not accept as true disputed issues of fact found therein. Pls.' Opp'n to RJN at 1, ECF No. 30.

As matters of public record, all the exhibits are proper subjects of judicial notice. Accordingly, the Court GRANTS all Defendants' Request for Judicial Notice. However, the Court takes judicial notice only of "the contents of the documents, not [the] truth of those contents." Gish v. Newsom, No. EDCV 20-755-JGB(KKx), 2020 WL 1979970 at *2 (C.D. Cal. April 23, 2020).

B. 12(b)(1) Motions

A defendant may move to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(1). If the plaintiff lacks standing under Article III of the United States Constitution then the court lacks subject-matter jurisdiction,

and the case must be dismissed. See Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011). Once a party has moved to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), the opposing party bears the burden of establishing the court's jurisdiction. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

1. Standing

Article III of the Constitution limits the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S. Const. art. III, § 2. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) (internal quotation marks and citation omitted). To establish standing "a plaintiff must show (1) [they have] suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. Inc., 528 U.S. 167, 180-81 (2000).

An organization has standing to sue on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

Plaintiff Coalition is a membership association of dining and lodging establishments in Mammoth Lakes. Compl. ¶ 15. In their complaint, Plaintiffs request compensatory damages in the amount of $500,000 or such other amount to be proven at trial against the County and Town Defendants. Compl. at 55-56. However, as the County and Town point out, that relief requires the participation of Coalition's individual members to determine what, if any, damages they have incurred. Town Mot. at 6; County Mot. at 5. Plaintiffs failed to address this in opposition and the Court finds that such a determination cannot be made without the individual members participation. See Opp'n at 19. Accordingly, Plaintiff Coalition lacks standing to seek compensatory damages. Hunt, 432 U.S. at 343 (an organization does not have standing to sue on behalf of its members when the relief requested requires the participation of individual members in the lawsuit.)

"Even when the plaintiff has alleged an injury sufficient to meet the 'case or controversy' requirement [. . .] the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). The Supreme Court has recognized that "there may be circumstances where it is necessary to grant a third party standing to assert the rights of another" but has set forth two additional requirements. Kowalski v. Tesmer, 543 U.S. 125, 129-30 (2004). First, the party asserting the right must have a close relationship with the person who possesses the right. Id. at 130. Second, there must be some sort of

hinderance to the possessor's ability to protect their own interest. Id.

Plaintiff Nomadness is a California corporation that manages, operates, and provides lodging services to customers, under contract with property owners. Compl. ¶ 23. While the orders may indirectly affect Nomadness, the rights it seeks to assert are those of the property owners and businesses with which it contracts. Plaintiffs again fail to address this argument, merely stating Nomadness has suffered financially as a result of the orders. Opp'n at 19. But this is not enough to assert the legal rights of third parties. See Warth, 422 U.S. at 499; Kowalski, 543 U.S. at 129-30. Plaintiffs point to no authority, and the Court is aware of none, that the contractual relationship in this case is sufficient to allow Nomadness to assert the legal rights of those business and property owners. See Kowalski, 543 U.S. at 130. Further, there is no indication that those third parties are unable to assert their own rights. Accordingly, Nomadness has failed to establish standing.[2]

2. Mootness

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues

[2] While the Town Defendants appear to raise this argument as a 12(b)(1) motion, see generally Town's Mot., the Court notes prudential standing issues are decided under 12(b)(6) in this circuit. See Doe v. Hamburg, No. C-12-3412 EMC, 2013 WL 3783749, at *5 (N.D. Cal. July 16, 2013); see also Ray Charles Foundation v. Robinson, 759 F.3d 1109, 1118 (9th Cir. 2015) ("Historically, courts have treated the limitation on third-party standing as a prudential principle that requires plaintiffs to assert their own legal rights.") However, for clarity, the Court addresses it with the other standing considerations.

presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Rosebrock v. Mathis, 745 F.3d 963, 971 (9th Cir. 2014) (internal citations omitted). However, voluntary cessation of challenged conduct does not necessarily render a case moot. Id. This is because "dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." Id. Courts presume that a government entity is acting in good faith when it changes its policy. Id. But courts "are less inclined to find mootness where the new policy could be easily abandoned or altered in the future." Id. at 972 (internal citation omitted). Finally, the party asserting mootness bears a "heavy burden" to show that "the challenged conduct cannot reasonably be expected to reoccur." Id.

On June 15, 2021, the Governor rescinded the vast majority of the State's COVID-19-related industry restrictions. See Beyond the Blueprint for Industry and Business Sectors Effective June 15, available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Beyond-Blueprint-Gramework.aspx. In light of this development, the Court requested supplemental briefing on the issue of mootness. See Order, ECF No. 35.

Plaintiffs contend the case is not moot under the voluntary cessation doctrine, as the uncertainty of the pandemic means Plaintiffs are under the constant threat of reinstatement of the prior restrictions and Defendants retain the authority to do so. Pls.' Suppl. Brief at 4, ECF No. 37. Defendants however argue that because of widespread vaccinations in the state "it is absolutely clear the allegedly wrongful behavior could not

reasonably be expected to recur" rendering Plaintiffs' claims for injunctive and declaratory relief moot. State Defs.' Suppl. Brief at 5-6, ECF No. 36.

The Court agrees with Plaintiffs that their claims for injunctive and declaratory relief are not moot under the voluntary cessation doctrine. While Defendants have rescinded the challenged orders "largely because of improved vaccine availability and the overall decline in Covid-19 cases and hospitalizations [. . .] it remains the case that the only certainty about the future course of this pandemic is uncertainty." Jones v. Cuomo, No. 20 CIV. 4898 (KPF), 2021 WL 2269551, at *5 (S.D.N.Y. June 2, 2021) (internal quotation marks and citation omitted). While vaccinations are a promising development, the pandemic is not over. New variants and vaccine hesitancy make it plausible that Defendants may determine it necessary to reimpose restrictions. Accordingly, Defendants have not demonstrated that "the challenged conduct cannot reasonably be expected to reoccur." Rosebrock, 745 F.3d at 972.

C. 12(b)(6) Motions

A Rule 12(b)(6) motion challenges the complaint as not alleging sufficient facts to state a claim for relief. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss [under 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). While "detailed factual allegations" are unnecessary, the complaint must allege more than "[t]hreadbare recitals of the elements of

a cause of action, supported by mere conclusory statements." Id. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

1. Substantive Due Process Claim

"Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases." Witt v. Dep't of Air Force, 527 F.3d 806, 817 (9th Cir. 2008). Although there is a "generalized due process right to choose one's field of private employment," subject to reasonable regulations, "[t]hese cases all deal with a complete prohibition of the right to engage in a calling," rather than a brief interruption in a party's ability to work. Conn v. Gabbert, 526 U.S. 286, 292 (1999). Neither the Supreme Court nor the Ninth Circuit has ever recognized the right to work or pursue a business enterprise as a fundamental right warranting higher scrutiny. Saga v. Tenorio, 384 F.3d 731, 743 (9th Cir. 2004) ("the Court has never held that the right to pursue work is a fundamental right"); see also Slidewaters LLC v. Washington State Dep't of Lab. & Indus., 2021 WL 2836630 at *7 (9th Cir. 2021) (instructing "the right to pursue a common calling is not considered a fundamental right" and the "proper test for judging the constitutionality of statutes regulating economic activity is whether the legislation bears a rational relationship to a legitimate state interest.")

To the extent Plaintiffs argue that the orders implicate

the right to interstate travel, Pls.' Opp'n at 6-8, they are precluded from asserting the rights of their out-of-state guests. See Warth v. Seldin, 422 U.S. 490, 499 (1975) ("plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") Further, neither the Supreme Court nor the Ninth Circuit has recognized a constitutional right to intrastate travel. Best Supplement Guide, LLC v. Newsom, 20-cv-00965-JAM-CKD, 2020 WL 2615022, at *5 (E.D. Cal. May 22, 2020). Because the orders do not implicate a fundamental right, they are constitutional so long as they are rationally related to a legitimate governmental interest.

It is uncontroverted that "[t]here is a legitimate state interest in preventing the spread of COVID-19, a deadly contagious disease." Slidewaters LLC, 2021 WL 2836630 at *7; see also Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest.") The remaining issue then is whether Defendants' actions are rationally related to this interest. The Court finds the challenged orders meet the requirements of rational basis review as a matter of law.

Restrictions on lodgings, hotels, and short-term rentals are rationally related to the goal of limiting the spread of COVID-19. Defendants, in enacting these restrictions, considered the ability to physically distance between individuals from different households. State's RJN, Ex. 3. Lodgings and hotels, by their nature, tend to host people from

multiple households and from different communities. Mixing of different households increases the chance of the virus spreading because each person infected at a hotel or lodging would bring the virus back to their household and community. State's Mot. at 7. It is therefore rational for the State to require lodgings, hotels, and short-term rentals to take measures to help prevent or slow the spread of COVID-19.

Restrictions on restaurants are also rational as eating and drinking requires the removal of masks, making transmission more likely. Id. Additionally, as with lodgings, restaurants tend to host people from numerous households for an extended period of time, creating the risk that one sick person will spread the disease to multiple households.

Plaintiffs' substantive due process claim thus fails as a matter of law. Because no additional fact discovery would alter this conclusion, Plaintiffs' first claim is dismissed with prejudice. See Deveraturda v. Globe Aviation Sec. Servs. 454 F. 3d 1043, 1046 (9th Cir. 2006 (explaining a district court need not grant leave to amend where amendment would be futile).

2. Procedural Due Process Claim

When the action complained of is legislative in nature — government decisions that affect large areas and are not directed at one or a few individuals — the constitutional procedural due process requirements of individual notice and hearing are not implicated. Halverson v. Skagit Cty., 42 F.3d 1257, 1260-61 (9th Cir. 1994), as amended on denial of reh'g (Feb. 9. 1995). "General notice as provided by law is sufficient." Id.

Here, the orders in question are ones of general applicability affecting the entire State, County, and Town. They are not directed at one or a few individuals. Accordingly, general notice as provided by law was sufficient and Plaintiffs have failed to state a claim for a procedural due process violation.[3] Id. The Court further finds that amendment would be futile and dismisses this claim with prejudice. See Deveraturda, 454 F.3d. at 1046.

3. Equal Protection Claim

Under the Equal Protection Clause, "[w]hen no suspect class is involved and no fundamental right is burdened, [courts] apply a rational basis test to determine the legitimacy of the classification." Kahawaiolaa v. Norton, 386 F.3d 1271, 1277-78 (9th Cir. 2004).

As discussed above, the orders at issue do not burden a fundamental right. Nor are the owners of hotels, lodgings, short-term rentals, and restaurants a suspect class. Accordingly, rational basis applies. For the same reasons set forth above, the Court finds the orders are rationally related to Defendants' legitimate interest in reducing the spread of COVID-19. Even if, as Plaintiffs contend, non-essential lodging was prohibited while other non-essential, equally risky business was allowed, the orders still survive rational basis review. Opp'n at 14 (citing Compl. ¶ 136). Defendants are "not required to draw a perfect line in determining which individual business

[3] Plaintiffs' argument that the orders failed to comply with California law, Opp'n at 15, is precluded under Pennhurst. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984).

can safely open and which cannot." Slidewaters LLC, 2021 WL 2836630 at *8. This claim is also dismissed with prejudice as the Court finds amendment would be futile. See Deveraturda, 454 F.3d at 1046.

4. Takings Claim

"The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth, provides that private property shall not be taken without just compensation." Lingle v. Chevron U.S.A Inc., 544 U.S. 528, 536 (2005). The Supreme Court has "recognized that government regulation of private property may in some instances, be so onerous" that it amounts to a taking. Id. at 537. A regulation constitutes an unconstitutional taking when: (1) it requires an owner to suffer a permanent physical invasion of its property; (2) it completely deprives an owner of all economically beneficial use of its property; or (3) upon evaluation of the factors set forth in Penn Central it is deemed to be an impermissible invasion of the owners property rights. Id. at 538. Under Penn Central, to determine whether a regulation constitutes a taking courts consider: (1) the economic impact on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978).

Plaintiffs argue that under the Penn Central factors, the orders have amounted to a taking because they have reduced Plaintiffs' profits and their investment-backed expectations that they would be able to use the property for short term

lodging and dining. Opp'n at 17. Plaintiffs also argue that the character of the regulation weighs in favor of finding a taking since they were not implemented through the legislative process. Id.

But, as the Court explained in Penn Central, the relevant inquiry is whether the government interference can be characterized as a physical invasion rather than an "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Cent., 438 U.S. at 124. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government." Id. The Court did not suggest, as Plaintiffs do here, that the characterization of the action as executive rather than legislative is relevant to the takings analysis.

Further, where a state has "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, [the Supreme] Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." Penn Cent., 438 U.S. at 125. For example, Mugler v. Kansas involved a challenge to Kansas' restrictions on the sale of alcohol. 123 U.S. 623, 659-60 (1887). Challengers, brewery businesses, argued that the prohibition interfered with their investment-backed expectation when they bought the property that they could use it as a brewery. Id. at 664. The Supreme Court, however, rejected their argument that this amounted to a taking requiring compensation. Id. Key to the Court's ruling was that the State

had determined the sale of alcohol to be detrimental to public health. Id. at 668-69. The Court noted that:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only declared by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest.

Id. While Mugler was decided pre-Penn Central, it is instructive on how general prohibitions on the use of land to protect public health should be considered under the factors today. Plaintiffs here, short-term lodging and restaurant businesses, argue, as the challengers did in Mugler, that the orders interfered with their investment-backed expectations that they could use their property as such. Opp'n at 17. But like in Mugler, that the government forbade certain property uses it determined to be injurious to public health does not constitute a taking. Plaintiffs were still able to use their property for lawful purposes or dispose of it. Further, under the orders, Plaintiffs were not prohibited from operating their businesses entirely but rather were subject to certain restrictions. States' Mot. at 9. While Plaintiffs may have lost profits as a result, this does not amount to a taking. See PCG-SP Venture I LLC v. Newsom, No. EDCV201138JGBKKX, 2020 WL 4344631, at *10 (C.D. Cal. June 23, 2020) ("To the extent the Orders temporarily deprive Plaintiffs of the use and benefit of its hotel, the Takings Clause is indifferent. The State is entitled to prioritize the health of the public over the property rights of

the individual.") Thus, this claim is dismissed with prejudice because the Court finds amendment would be futile. See Deveraturda, 454 F.3d at 1046.

5. Dormant Commerce Clause Claim

"Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1147 (9th Cir. 2012) (quoting South-Centr. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984)). This limitation on the states to regulate commerce is "known as the dormant Commerce Clause." Id. The primary purpose of the dormant Commerce Clause is to prohibit "statutes that discriminate against interstate commerce" by providing benefits to "in-state economic interests" while "burdening out-of-state competitors." Id. at 1148 (internal quotation marks and citations omitted).

"If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'" Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1087 (9th Cir. 2013) (quoting Maine v. Taylor, 477 U.S. 131, 138 (1986)). "Absent discrimination, [the Court] will uphold the law 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Id. at 1087-88 (quoting Pike v.

Bruce Church, Inc., 397 U.S. 137, 142 (1970)). "The party challenging the statute bears the burden of showing discrimination." Black Star Farms, LLC v. Oliver, 600 F.3d 1225, 1230 (9th Cir. 2010).

Here, the orders are facially neutral, as they apply to lodgings and restaurants regardless of their ties to interstate commerce. See Int'l Franchise Ass'n, Inc. v. City of Seattle, 803 F.3d 389, 400 (9th Cir. 2015). Nor is there any indication that the purpose of the orders is to discriminate rather than advance the legitimate objective of curbing the spread of COVID-19. Rocky Mountain Farmers Union, 730 F.3d at 1097-98 ("The party challenging a regulation bears the burden of establishing that a challenged statute has a discriminatory purpose or effect under the Commerce Clause. We will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.") And any incidental effect on interstate commerce is not substantially outweighed by the local benefits of reducing the spread of COVID-19, a contagious and deadly disease. See Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1146-47 (9th Cir. 2015) (finding no significant interference with interstate commerce when the regulation addressed legitimate matters of local concern and did not involve the regulation of activities that were inherently national or require a uniform system of regulation); see also Hopkins Hawley LLC v. Cuomo, No. 20-CV-10932 (PAC), 2021 WL 465437, at *8 (S.D.N.Y. Feb. 9, 2021) ("even assuming that the

Dining Policy has imposed incidental burdens on interstate commerce—for example, on out-of-state restaurant suppliers or interstate travelers—the Plaintiffs have not shown that these burdens are 'incommensurate' with the local benefit of mitigating further transmission of the COVID-19 virus.") Accordingly, Plaintiffs have failed to state a plausible dormant Commerce Clause claim and Defendants' motion to dismiss this final claim is granted with prejudice, as the Court finds that amendment would be futile. See Deveraturda, 454 F.3d at 1046.

III. ORDER

For the reasons set forth above, the Court GRANTS Defendants' Motions to Dismiss all claims against them WITH PREJUDICE.

IT IS SO ORDERED.

Dated: August 4, 2021

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE